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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 736

EVANSTON-NORTH SHORE BOARD OF REALTORS,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. A3–A17) is reported at 320 F. 2d 375. The court's findings of fact (Pet. App. A17–A39) are not reported.

JURISDICTION

The judgment of the Court of Claims was entered on July 12, 1963 (R. 27), and a motion for rehearing was denied on October 11, 1963 (R. 79). The petition for a writ of certiorari was filed on January 8, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the court below erred in holding that petitioner did not qualify for tax exemption as a real-estate board under Section 501(c)(6) of the 1954 Code because its principal activity was the operation of a multiple listing service for the benefit of its individual members.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1954:

> SEC. 501. EXEMPTION FROM TAX ON CORPORATIONS, CERTAIN TRUSTS, ETC.
>
> (a) *Exemption From Taxation.*—An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502, 503, or 504.
>
> * * * * *
>
> (c) *List of Exempt Organizations.*—The following organization are referred to in subsecsection (a):
>
> * * * * *
>
> (6) Business leagues, chambers of commerce, real-estate boards, or boards of trade, not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual.
>
> * * * * *

Treasury Regulations on Income Tax (1954 Code):

> Sec. 1.501(c)(6)-1 *Business leagues, chambers of commerce, real estate boards, and boards of trade.*
>
> A business league is an association of persons having some common business interest, the

purpose of which is to promote such common business interest and not to engage in a regular business of a kind ordinarily carried on for profit. It is an organization of the same general class as a chamber of commerce or board of trade. Thus, its activities should be directed to the improvement of business conditions of one or more lines of business as distinguished from the performance of particular services for individual persons. An organization whose purpose is to engage in a regular business of a kind ordinarily carried on for profit, even though the business is conducted on a cooperative basis or produces only sufficient income to be self-sustaining, is not a business league. An asspciation engaged in furnishing information to prospective investors, to enable them to make sound investments, is not a business league, since its activities do not further any common business interest, even though all of its income is devoted to the purpose stated. A stock or commodity exchange is not a business league, a chamber of commerce, or a board of trade within the meaning of Section 501(c)(6) and is not exempt from tax. Organizations otherwise exempt from tax under this section are taxable upon their unrelated business taxable income. See part II (section 511 and following), subchapter F, chapter 1 of the Code, and the regulations thereunder.

STATEMENT

The facts as found by the Court of Claims (Pet. App. A17–A39) may be summarized as follows:

Petitioner was formed in 1936 as a non-stock, non-profit Illinois corporation (Pet. App. A17). According to its articles of incorporation, its purposes were generally those of a conventional real-estate board (Pet. App. A17–A18). Its membership, numbering 581 during the year in suit, is basically limited to real estate brokers and salesmen operating in the Evanston and North Shore area of suburban Chicago (Pet. App. A18). By a letter dated January 13, 1942, the Commissioner advised petitioner that, on the basis of the information it had submitted, it qualified for exemption as a real-estate board under Section 101(7) of the 1939 Code, which is virtually identical to Section 501(c)(6) of the 1954 Code (Pet. App. A20).

Following a review of petitioner's exempt status beginning in 1957, and after additional information was requested and conferences held, the Commissioner advised petitioner on June 10, 1960, that its exempt status was terminated effective June 30, 1958, the end of petitioner's 1958 fiscal year (Pet. App. A20–A24). The ground on which the Commissioner revoked his prior ruling was stated in the letter issued by him on June 10, 1960 (Pet. App. A24–A25):

> By letter dated December 5, 1957, you were advised that we proposed to revoke our above exemption rulings because of a conclusion that your primary activity is the operation of a multiple listing system, which activity results in the performance of particular services for indi-

vidual persons and is a business of a kind ordinarily carried on for profit. As you have since been apprised, such conclusion reflects the Service position set forth in Revenue Ruling 59-234, Internal Revenue Bulletin 1959-28, 11, which reads, in part, as follows:

> "* * * It is apparent that the multiple listing system as operated by real estate boards is inherently designed for the rendering of particular services for individual members as a convenience and economy in the conduct of their respective businesses. Therefore, the instant organization, instead of primarily engaging in activities for the improvement of business conditions within the real estate business generally, is performing particular services for its members through the maintenance and operation of its multiple listing system by providing them with listings of properties for sale, which serve them as a convenience and economy in the conduct of their businesses. * * *"

The 1960 ruling letter also contained a statement setting forth the reasons why the Commissioner had determined that a multiple listing service resulted in the performance of particular services for individual persons (Pet. App. A25-A26):

> With reference to the question of whether the multiple listing system results in the performance of particular services for individual persons, the National Association of Real Estate Boards, as quoted above, has described the system as "a medium through which real estate may be merchandised efficiently" and as a "tremendous merchandising method." Fur-

> ther, listings are considered a "stock in trade." It is also pertinent to note that although you contend that the real estate business and the community as a whole benefit therefrom, the systems are supported by payments of a portion of the income which specific realtors derive from the existence of the system. We hold, therefore, that the principal purpose of the system is to furnish salable property to those realtors who participate in the program, which purpose is clearly aimed at the benefit of the participants in their individual capacities rather than the quasi-public, semi-civic benefit of the business community as a whole in the manner contemplated by the applicable Income Tax Regulations.

After the 1960 ruling, the District Director at Chicago proposed a deficiency of $3,510.89 in federal income taxes for the fiscal year June 30, 1959. On February 28, 1961, petitioner paid that amount together with interest of $324.76 (Pet. App. A26).

On March 13, 1961, petitioner filed a timely claim for refund of all taxes and interest paid for 1959. The sole basis of recovery asserted in the claim was that petitioner was exempt from taxation as a real-estate board under Section 501(c)(6) of the Internal Revenue Code of 1954. On March 23, 1961, the Commissioner formally disallowed the claim and six days thereafter, on March 29, 1961, petitioner filed the instant suit (Pet. App. A27).

The Court of Claims found that a substantial part of petitioner's activities consisted of rendering serv-

ices to its individual members through the operation of a multiple listing service, and accordingly held that petitioner did not qualify for exemption from income tax as a real-estate board under Section 501(c)(6) of the Internal Revenue Code of 1954 (Pet. App. A12–A13, A16–A17).

ARGUMENT

1. Section 501(c)(6) of the 1954 Code, *supra*, pp. 2–3, exempts real-estate boards from taxation if they are not organized for profit and if no part of their net earnings inures to the benefit of their members. The applicable Treasury Regulations provide that, in order for an organization to qualify for exemption under Section 501(c)(6), "its activities should be directed to the improvement of business conditions of one or more lines of business as distinguished from the performance of particular services for individual persons." Treasury Regulations on Income Tax (1954 Code), Section 1.501(c)(6)–1, *supra*, p. 2. This language has remained unchanged through repeated statutory reenactments since it was first adopted in 1929 (Treasury Regulations 74 (1929 ed.), Art. 528)[1] and thus has acquired virtually the status of statutory law.

[1] Treasury Regulations 74 (1929 ed.), Art. 528; Treasury Regulations 77 (Revenue Act of 1932), Art. 528; Treasury Regulations 86 (Revenue Act of 1934), Art. 101(7)–1; Treasury Regulations 94 (Revenue Act of 1936), Art. 101(7)–1; Treasury Regulations 101 (Revenue Act of 1938), Art. 101(7)–1; Treasury Regulations 103 (1939 Code), Sec. 19.101(7)–1; Treasury Regulations 111 (1939 Code), Sec. 29.101(7)–1; Treasury Regulations 118 (1939 Code), Sec. 39.101(7)–1; and Treasury Regulations on Income Tax (1954 Code), Sec. 1.501(c)(6)–1.

Automotive Electric Ass'n v. *Commissioner*, 168 F. 2d 366, 367 (C.A. 6); *Apartment Operations Ass'n* v. *Commissioner*, 136 F. 2d 435, 436 (C.A. 9). Consequently, an organization is not exempt if its purpose is in large part to render valuable services to its members, because then the net earnings of the organization inure to the benefit of its members. See, *e.g.*, *General Contractors' Ass'n* v. *United States*, 202 F. 2d 633, 636 (C.A. 7); *Northwestern Municipal Ass'n* v. *United States*, 99 F. 2d 460, 463 (C.A. 8); *Northwestern Jobbers' Credit Bureau* v. *Commissioner*, 37 F. 2d 880, 883 (C.A. 8); *Apartment Operations Ass'n* v. *Commissioner*, 136 F. 2d 435 (C.A. 9); *Produce Exchange Stock Clearing Ass'n* v. *Helvering*, 71 F. 2d 142 (C.A. 2); Rev. Rul. 59–234, 1959–2 Cum. Bull. 149.

The Court of Claims resolved the crucial factual questions so as to require denial of the exemption to petitioner. The court found that petitioner's multiple listing service performed a valuable service to its individual members and that, since the operation of this service was a substantial part of petitioner's activities, the purpose of the organization was also substantially to give service to its members (Pet. App. A12–A13). These findings are amply supported by the evidence: the fees charged for the listing service are in approximate proportion to the benefits received by each member (Pet. App. A9); participation in the listing service is limited to members (Pet. App. A10); the industry regards the listing service as a "sales tool" (Pet. App. A10–A11); a listing service is analogous to a stock or commodity exchange (Pet. App. A11–A12); and the listing service accounted for

approximately half of petitioner's total receipts and expenditures [2] and required the time and effort of most of its employees (Pet. App. A13–A14, A22–A23, A39).

2. Petitioner's principal contention is that an organization, such as a real estate board, is exempt, even though most of its activities would not warrant independent exemption, if it has an exempt purpose and all its earnings are used for this purpose. This argument assumes that a listing service is a non-exempt activity. Petitioner nonetheless claims that it is entitled to exemption since it has the exempt purpose of serving the common interest of its members and all the earnings of the listing service are used for this purpose.

Even if petitioner were correct that an organization is exempt if it has an exempt purpose even though most of its activities were non-exempt (but see, *e.g.*, *Scripture Press Foundation* v. *United States*, 285 F. 800 (Ct. Cl.), certiorari denied, 368 U.S. 985), here, as we have seen, petitioner did not have an exempt purpose. The Court of Claims found that petitioner's main activity was non-exempt—*i.e.*, providing a valuable listing service for its members—and that therefore the main purpose of the organization was non-exempt. While the purpose of an organization may perhaps be different from its main activity in some circumstances (see *Texas Mobile Home Ass'n* v. *Commissioner*, C.A. 5, decided November 21, 1963), here there was no such evidence.

[2] Of petitioner's $94,652.77 gross income for fiscal year 1956, $57,381 was derived from the operation of the listing service. Of total expenses of $76,654.70 for the same period, $32,591.50 is directly allocable to the listing service, as is a substantial portion of $16,339.11 paid for salaries (Pet. App. A13).

The cases cited by petitioner establish, at the very most, that an organization may be exempt if it has an exempt purpose even though a substantial part of its activity is not exempt. Since, as we have seen, petitioner was found not to have an exempt purpose, these cases are inapposite. Moreover, most of these cases do not support petitioner's legal position. In *Trinidad* v. *Sagrada Orden*, 263 U.S. 578, an exempt religious organization undertook as a minor part of its activities to sell wine and chocolate to its member churches, from which activities it received a small amount of income. In holding that the organization did not lose its exemption, the Court noted that such "limited trading, if it can be called such, is purely *incidental* to the pursuit of those [religious] purposes, and is in no sense a distinct or external venture" (emphasis added). *Id.* at 581. While the Court stated that the question of exemption turned upon the destination of the receipts, not their source (*ibid*), the Court was there speaking of the passive investment income which formed the great bulk of the organization's receipts. Similarily, in *Commissioner* v. *Chicago Graphic Arts Federation, Inc.*, 128 F. 2d 424 (C.A. 7), and *Crooks* v. *Kansas City Hay Dealers' Ass'n*, 37 F. 2d 83 (C.A. 8), the organizations were held exempt since their nonexempt activities were found to be merely incidental or subordinate to the organizations' exempt activities. See also *General Contractors' Ass'n* v. *United States*, *supra*, 202 F. 2d at 638.

The plain implication of *Sagrada Orden* and the lower-court decisions cited above is that a corporation

whose nonexempt activities are more than "purely incidental" is not within the exempt class even though it also performs tax exempt activities. Here, over half petitioner's receipts and about half its expenditures related to the listing service (Pet. App. A13–A14, A22–A23, A39). In short, the very reason which impelled this Court in *Sagrada Orden* to hold that the organization there involved was exempt compels the opposite conclusion here.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
LOUIS F. OBERDORFER,
Assistant Attorney General.
MELVA M. GRANEY,
RALPH A. MUOIO,
Attorneys.

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